Supreme Court, U.S.
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No. 01-197

IN THE

Supreme Court of the United States

EUGENE W. SLATTERY,

Petitioner,

v.

SWISS REINSURANCE AMERICA CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

FRANCIS P. ALVAREZ*
CHRISTINA CALISE FEENY
JACKSON LEWIS SCHNITZLER & KRUPMAN
Attorneys for Respondent
177 Broad Street
P.O. Box 251
Stamford, CT 06094
(203) 961-06904

* *Counsel of Record*

169150

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Swiss Reinsurance America Corporation, is a wholly-owned subsidiary of Swiss Re America Holding Corp., a Delaware corporation.

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REASONS FOR DENYING THE WRIT

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court reversed the judgment of the Fifth Circuit Court of Appeals in favor of the employer because that Court imposed an incorrect evidentiary burden on the plaintiff/employee. In *Reeves*, this Court's message was clear — there are no automatic rules for assessing liability based on the type of evidence presented at trial or the summary judgment stage. In some cases, proof of a prima facie case of discrimination combined with some evidence that the employer's explanation for an adverse employment action is not true will be sufficient to support a finding of liability. In others, it will not be. Liability should not be determined based on the type of evidence presented. The strength and quality of evidence, whether it be "prima facie evidence," "evidence of falsity" or "direct evidence," should drive the Court's judgment as to whether a plaintiff has satisfied the ultimate burden of proof.

In affirming judgment for Respondent, the Second Circuit applied precisely this type of individualized assessment of the evidence. The Second Circuit evaluated the strength of the evidence consistent with the three factors referenced in *Reeves*, i.e., the strength of the prima facie case (which it found weak), the evidence that the employer's explanation was not true (which it found weak), and the other evidence presented by Respondent in support of its explanation (which it found significant). The Second Circuit did exactly as this Court instructed.

Petitioner's suggestion that he would have fared better in other Circuits because other Courts of Appeals apply

Reeves differently than the Second Circuit is not supported by the case law he cites. There is no conflict among the Courts of Appeals. It appears that the Courts of Appeals are applying a case-by-case examination of the evidence.

What Petitioner seeks is exactly what *Reeves* rejected — a blanket rule. Petitioner seeks a rule that would *always* require a jury trial whenever a plaintiff presented a prima facie case and evidence to support a jury finding that the employer's explanation for the action at issue was not true. Petitioner ignores the express statements in *Reeves* that there might be circumstances where evidence of a prima facie case and pretext are not enough to support a jury verdict. Indeed, if Petitioner's view were accepted, as the Court observed in *Reeves*, motions under Federal Rules of Civil Procedure 50 and 56 would be rendered meaningless whenever a plaintiff presented evidence of a prima facie case and pretext.

ARGUMENT

I. In *Reeves*, This Court Rejected Blanket Rules Or Formulas And Instructed Lower Courts To Assess The Strength Of Evidence To Determine If A Plaintiff Met The Ultimate Burden Of Proof.

In *Reeves*, this Court granted certiorari:

> to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory

> explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

Reeves, 530 U.S. at 140. This Court held that "a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability," and that "the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." *Id.* at 149.

This Court expressly stated, however, that holding that such evidence may permit a finding of liability "is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability." *Id.* at 148. (emphasis in original). The Court noted that "[c]ertainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* This Court offered two examples of such instances. First, the Court stated "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision[.]" *Id.* Second, the Court noted judgment in favor of an employer would be appropriate "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.*

The Court stated that whether judgment for the employer was proper would depend on a number of factors including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 148-149.

Slattery's suggestion that he was entitled to a jury trial merely because he presented a prima facie case and some evidence of pretext misses *Reeves'* most fundamental message: *there are no blanket rules.*

II. In *Slattery*, The Second Circuit Reached Its Conclusion By Weighing The Evidence In Precisely The Manner Required By *Reeves*.

Citing *Reeves*, the Second Circuit in *Slattery v. Swiss Reinsurance America Corp.*, No. 00-7787, 2001 U.S. App. LEXIS 15058 (2d Cir. May 3, 2001, as amended June 6, 2001) (reprinted in Petitioner's Appendix (hereinafter "Pet. App.") at 1-17) held that "[a] case-by-case examination is warranted to determine whether the *prima facie* showing plus pretext could satisfy the plaintiff's 'ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff'." (Pet. App. at 13) The Second Circuit then stated that "[h]aving undertaken such an examination here, we conclude that the plaintiff's proffered evidence fails to warrant a jury trial." (Pet. App. at 13)

The Second Circuit followed exactly the evidentiary scheme described by *Reeves*. It considered all the evidence and evaluated the three factors cited in *Reeves*, i.e., the strength of the plaintiff's prima facie case, the strength of the plaintiff's evidence of pretext, and the strength of the evidence presented by the employer in support of its legitimate nondiscriminatory explanation. (Pet. App. at 10-14) It found the most significant piece of evidence Slattery presented in support of his *prima facie* case was Kielholz's statement that he intended to make the image of Swiss Re younger and he had reduced the average employee age to

39. (Pet. App. at 9-10) The Court found this statement was enough to establish a *prima facie* case, but also found it to be weak evidence of discrimination, noting that "in light of Kielholz's statement that he was 'looking to hire rather than fire staff,' one may well doubt that a *prima facie* case exists." (Pet. App. at 11)

The Second Circuit found Slattery presented evidence of pretext by pointing to evidence Swiss Re did not present. This included: (1) evidence to dispute Slattery's claim that he was the largest producer of new business in the Northeast BDU; (2) evidence about the performance of the Northeast BDU to support its claim that 1998 and 1999 were its most productive years; and (3) evidence to dispute Slattery's claim that his co-workers in the BDU also did not produce new business in 1998 or 1999 but were not fired. (Pet. App. at 12) The Court also viewed this evidence as weak, noting that:

> although other employees had failed to produce new business had not been fired, Swiss Re's legitimate business reason for Slattery's termination went beyond his failure to produce new business. Slattery's supervisors were dissatisfied with the lateness of his reports, the quality of those reports, and his failure to provide leadership. And, with regard to these concerns, Slattery has not demonstrated that his coworkers were similarly situated.

(Pet. App. at 14)

The Second Circuit also noted that Respondent presented strong evidence in support of its asserted legitimate

nondiscriminatory reason. It found Respondent "easily met its burden of demonstrating a legitimate nondiscriminatory reason for its actions." (Pet. App. at 11) It found that Respondent's dissatisfaction with Petitioner's performance, and in particular with his failure to bring in new business, was "extremely well-documented." (Pet. App. at 11) The Court noted:

> It is manifest from a reading of the record that Slattery went about his job differently from the way his superiors would have liked. For example, he maintained as clients large firms with small business volume in the hopes of generating more business from them, while Swiss Re repeatedly urged him to generate new clients with initially larger volumes. Not only did Swiss Re, between 1996 and 1999, become gradually and increasingly dissatisfied with Slattery's performance in many respects, but Slattery's supervisors made it absolutely clear that Slattery's future employment depended upon his ability to bring in new business in 1998 and 1999-a not unreasonable request. Slattery himself concedes that he did not bring in any new business after 1997. Certainly Slattery's late reports, failure to lead, and incapacity to bring in new business — especially in the face of an express requirement that he do so — were legitimate business reasons for his probation and termination.

(Pet. App. at 11-12)

Because it applied the evidentiary burden prescribed by this Court, the Second Circuit's judgment should be given

deference.[1] While this Court, or other Courts of Appeals, or even other panels of the Second Circuit could conceivably view the strength of each party's evidence differently, that does not make it appropriate to grant the Writ. That is a reality inherent in all litigation. Whether a case involves negligence, contracts, patent law, or any other subject, judges could view the same evidence and reach different conclusions on whether it could reasonably support a finding of liability. But if judgment is entered based on a correct application of the law, the case should go no further. To find otherwise would prevent judges from exercising "judgment." And, as observed by the Court in *Reeves*, would effectively insulate an entire category of employment discrimination cases from review under Rules 50 and 56. *Reeves*, 530 U.S. at 148, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

III. There Are Not Divergent Views Among the Courts of Appeals Cited By Petitioner On The Evidentiary Burden Post-*Reeves* — They Apply A Case-By-Case Assessment Of The Evidence To Determine Whether A Plaintiff Has Satisfied The Ultimate Burden Of Proof.

A review of the post-*Reeves* Courts of Appeals decisions cited by Slattery demonstrates that, as instructed by the Supreme Court, the Courts of Appeals are weighing the evidence in each case to determine whether the employer is entitled to judgment as a matter of law. Sometimes the Courts granted judgment as a matter of law; other times they denied it. They did not apply a blanket rule.

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1. Because this analysis is essentially the example provided by the Court in *Reeves*, there also is no need to identify additional circumstances where judgment could be proper for the employer.

A. The Second Circuit Cases Cited By Petitioner Apply A Case-By-Case Analysis Of The Evidence.

In *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000), the Second Circuit affirmed summary judgment to the employer in an age discrimination case. The Court held that although plaintiff presented evidence of pretext, he "has not demonstrated that the asserted pretextual reasons were intended to mask age discrimination." *Id.* at 88. The Court reached this conclusion by weighing the evidence precisely in the manner required by *Reeves*:

> *Reeves* prevents courts from imposing a *per se* rule requiring *in all instances* that an ADEA claimant offer more than a prima facie case and evidence of pretext . . . But the converse is not true; following *Reeves*, we decline to hold that *no* ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext. Rather, we hold that the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff'.

Id., *citing Reeves*, 120 S. Ct. at 2106.

In *James v. NY Racing Assn.*, 233 F.3d 149 (2d Cir. 2000), the Second Circuit affirmed summary judgment for the employer, finding that plaintiff's prima facie and pretext

evidence were insufficient to warrant a jury trial. The Court stated:

> We recognized that in some circumstances the prima facie case and/or evidence of falsity might give powerful evidence of discrimination — more than enough to sustain a plaintiff's verdict — but in others, the two together might fall far short of providing evidence from which a reasonable inference of discrimination can be drawn.

Id. at 154. *James* also follows *Reeves*' lesson:

> (i) evidence satisfying the minimal McDonnell Douglas prima facie case, coupled with evidence of falsity of the employer's explanation, *may or may not be sufficient to sustain a finding of discrimination*; (ii) once the employer has given an explanation, there is no arbitrary rule or presumption as to sufficiency; (iii) the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove — particularly discrimination.

Id. at 156-157.

By contrast, in *Zimmerman v. Associates Firstcapital Corporation*, 251 F.3d 376 (2d Cir. 2001), the Second Circuit affirmed judgment for the plaintiff in a gender discrimination case. The Court held that although the evidence beyond the prima facie case was slight, the plaintiff presented extremely substantial evidence that the employer's explanation was

false, noting that the employer's evidence was "woefully inadequate." *Id.* The Court stated that "*Reeves* instructed that the combination of evidence establishing a prima facie case and evidence showing that a proffered explanation is neither always to be deemed sufficient . . . nor always to be deemed insufficient." *Id.* at 381. The Court stated that "*Reeves* recommended a case-by-case approach," which included a review of the strength of the prima facie case, the probative value of the proof that the employer's explanation was false and any other evidence supporting the employer's explanation. *Id.* at 381. As it did in *Schnabel*, *James* and *Slattery*, the Court outlined its task: "to examine the entire record and, in accordance with *Reeves*, make the case-specific assessment as to whether a finding of discrimination may reasonably be made." *Id.* at 382.

The Second Circuit decisions cited by Slattery do not conflict with the standards set forth in *Reeves*.

B. The Other Courts Of Appeals Decisions Cited By Slattery Also Apply The Same Evidentiary Burden As The Second Circuit Did In *Slattery*.

Petitioner claims that Slattery clearly "would have fared far better in the Fourth, Fifth, Sixth, Ninth or Eleventh Circuits." (Petition at 7). A review of those decisions, however, reveals that they imposed the same evidentiary burden as the Second Circuit did in *Slattery*.

1. The Fourth Circuit

In *Rowe v. Marley Co.*, 233 F.3d 825 (4th Cir. 2000), the Fourth Circuit affirmed the grant of summary judgment to the employer. It did this after reviewing the facts of the

case with *Reeves*' "principles in mind," because the plaintiff failed to demonstrate that the employer's proffered non-discriminatory reasons for discharging him were pretextual. *Rowe*, 233 F.3d at 830-831. The Court stated that:

> in *Reeves* the Supreme Court held that when a plaintiff establishes a prima facie employment discrimination case and that his employer's explanation is pretextual, this does not automatically create a jury question, but it may do so. Even when a plaintiff demonstrates a prima facie case and pretext, his claim should not be submitted to a jury if there is evidence that precludes a finding of discrimination, that is if "no rational factfinder could conclude that the action was discriminatory." [citing *Reeves*, 120 S. Ct. at 2109].

Id. at 830. The *Rowe* court recognized that proof of a prima facie case and pretext will not always create a jury question.

Equal Employment Opportunity Commission v. Sears Roebuck & Co., 243 F.3d 846 (4th Cir. 2001), not cited by Slattery, actually undermines his claim of a "divergent" view. In *Sears*, the Fourth Circuit reversed summary judgment to an employer because the EEOC "made out a *strong* prima facie case of national origin discrimination and offered *ample* evidence to discredit Sears's proffered non-discriminatory reason for its failure to hire Santana." *Id.* at 854 (emphasis added). In doing so, however, the Fourth Circuit expressly referenced and implicitly endorsed both the Second Circuit's reasoning and result in *Schnabel*. *See Sears*, 243 F.3d at 857.

2. The Fifth Circuit

In *Blow v. City of San Antonio*, 236 F.3d 283 (5th Cir. 2001), the Fifth Circuit reversed a grant of summary judgment to the employer where the plaintiff proved her prima facie case, presented sufficient evidence to create a material issue of disputed fact as to whether the employer's explanation was false and there were "no unusual circumstances that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII." *Id.* at 298. Whether "unusual" or not, the circumstances referred to by the Court are those cited by *Reeves*, i.e., " 'if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred'." *Id.* at n.3, *quoting Reeves*, 120 S. Ct. at 2109.

In *Evans v. City of Bishop*, 238 F.3d 586 (5th Cir. 2001), the Fifth Circuit also reversed a grant of summary judgment in a race discrimination case in light of *Reeves*, where plaintiff produced evidence of a prima facie case and pretext. The court noted that "*Reeves* instructs that this showing is usually sufficient for a plaintiff's case to survive summary judgment," *Id.* at 591, but, like *Blow*, the reference to "usually sufficient" focuses on the frequency that summary judgment would be granted, not the quality of the evidence.

Crawford v. Formosa Plastics Corp., 234 F.3d 899 (5th Cir. 2000), not cited by Slattery, confirms that the Fifth Circuit applies a case-by-case approach. In *Crawford*, the Fifth Circuit affirmed summary judgment to an employer because the

plaintiff's evidence of pretext was " 'not so persuasive so as to support an inference that the real reason was discrimination'," noting:

> a plaintiff must present "*sufficient* evidence to find that the employer's asserted justification is false." . . . It is, therefore, possible for a plaintiff's evidence to permit a tenuous inference of pretext and yet be insufficient to support a reasonable inference of discrimination. . . . The determination must be made on a case-by-case basis, depending on the nature, extent and quality of the evidence, as to whether a jury could reasonably infer discrimination.

Id. at 903-904 (internal citations omitted). *See also Rubinstein v. Administrators of the Tulande Educational Fund et al.*, 218 F.3d 392, 400 (5th Cir. 2000), *cert. denied*, no. 00-996, 2001 U.S. LEXIS 2446 (2001) (affirming summary judgment for an employer where plaintiff demonstrated pretext because of the "overall lack of any evidence of discriminatory intent," noting "[w]hile we are mindful of the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext . . . discrimination suits still require evidence of discrimination.")

3. The Sixth Circuit

In *Ross v. Campbell Soup Co.*, 237 F.3d 701 (6th Cir. 2001), the Sixth Circuit reversed a grant of summary judgment to the employer in a disability discrimination case. While the Court did not enumerate the *Reeves* factors in its decision, consistent with *Reeves*, it weighed the evidence noting there was "substantial" evidence that the plaintiff's medical

status played a "significant" role in the employer's decision. *Id.* at 709. *Ross* does not preclude the grant of summary judgment on lesser evidence and does not suggest that the Sixth Circuit applies a blanket rule.

4. The Ninth Circuit

In *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001), the Ninth Circuit affirmed summary judgment to the employer in a disability discrimination case because, although the employer gave inconsistent statements about the timing of its decision to terminate the plaintiff, there was insufficient evidence of pretext. *Snead*, 237 F.3d at 1094. *Snead* does not support Slattery's position. Because the *Snead* plaintiff had not demonstrated pretext, *Snead* does not establish what evidence the Ninth Circuit deems necessary to survive summary judgment where a plaintiff has demonstrated a prima facie case and pretext. Nothing in *Snead* supports Slattery's suggestion that a plaintiff *never* has to introduce additional evidence beyond a prima facie case and pretext.

5. The Eleventh Circuit

In *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821 (11th Cir. 2000), the Eleventh Circuit reversed a grant of summary judgment to the employer. The Court examined the record and weighed the strength of the prima facie case, the probative value of the proof that the employer's explanation was false, and any other evidence supporting the employer's case, noting "[w]e have taken those factors into consideration in this case." *Hinson*, 231 F.3d at 831-32. The Court concluded that "this is a case where 'a plaintiff's prima facie case, combined with sufficient evidence to find

that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated'." *Id. quoting Reeves*, 120 S. Ct. at 2109. *Hinson* supports Respondent's contention that the Court must weigh all the evidence and make a case-by-case assessment of whether summary judgment is appropriate. *See also Chapman v. AI Trans.*, 229 F.3d 1012 n.11 (2000) (noting that the "Supreme Court's decision in *Reeves* modified part of our *Combs* [*v. Plantation Patterns Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045, 118 S. Ct. 685 (1998)] decision. We had stated in *Combs* that judgment as a matter of law was unavailable to an employer once a plaintiff offered sufficient evidence of pretext as to each of the proffered reasons. . . . *Reeves* tells us judgment as a matter of law will sometimes be available to an employer in such a case.")

* * *

The Courts of Appeals decisions cited by Slattery do not establish a blanket rule that those Courts will *always* deny summary judgment where the plaintiff establishes a prima facie case and presents evidence of pretext. Instead, the Courts weigh all the evidence and make a case-by-case assessment as to whether summary judgment is appropriate.

CONCLUSION

Applying the correct evidentiary burden, and considering the strength of all the evidence, the Second Circuit concluded that Petitioner's evidence did not satisfy his ultimate burden of proof. The Second Circuit's decision is consistent with *Reeves* and the decisions of other Courts of Appeals. There is no divergence among the Circuits and no significant question of law for this Court to consider. The Writ should be denied.

Respectfully submitted,

FRANCIS P. ALVAREZ*
CHRISTINA CALISE FEENY
JACKSON LEWIS SCHNITZLER
& KRUPMAN
Attorneys for Respondent
177 Broad Street
P.O. Box 251
Stamford, CT 06094
(203) 961-06904

* *Counsel of Record*